No. 77-694

In the
Supreme Court of the United States

October Term 1977

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Petitioner,

vs.

GREYHOUND COMPUTER CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO IBM'S PETITION FOR A WRIT OF CERTIORARI

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I. STATEMENT OF THE CASE:

PETITIONER'S ARGUMENT AND BRIEF PRESENT NO BASIS FOR REVIEW UNDER TRADITIONAL STANDARDS AND IGNORE THE AMPLE FACTS OF RECORD SUPPORTING THE SUBMISSION OF ALL ISSUES TO THE JURY.

We respectfully suggest that this Court deny the IBM Petition for a Writ of Certiorari because that petition is primarily an argument rehashing factual positions pointedly rejected by the Ninth Circuit after a five year review of this record. This Court, under Supreme Court Rule 19, should not assume the burden

of evaluating the detailed basis for a decision reversing a directed verdict.

The Ninth Circuit found substantial, indeed compelling, evidence to submit four controlling factual issues to the jury:

First, that the market within which the companies competed was the leasing of general purpose computers (infra II at p. 12);

Second, that in that market IBM appears to have a monopoly with 80% of computer leasing (Appendix 1a et seq.);

Third, that Greyhound and other "leasing companies" purchased IBM equipment from 1964 to 1968 and thereafter became IBM's "largest single competitor." IBM appears to have deliberately attempted to destroy that industry because the leasing companies were—according to IBM's own internal management documents—"eating away our rental base" (Appendix 5a to 7a); and

Fourth, IBM planned to and eliminated the leasing companies by using practices that the Ninth Circuit states: "appear *prima facie* to be anticompetitive activities that impaired competition without a legitimate business purpose." The evidence is that Greyhound planned to invest $50,000,000 per year and was prevented from doing that.

Petitioner's suggestion that some other market ought to be used, or that the market shares in some other market are different, or that IBM on a full trial can show some business reasons for what it did, are all speculative arguments that have no place in a Court of Appeals re-

view of a directed verdict, let alone in a petition for a writ of certiorari.

Under the innocuous heading "Reasons For Granting The Writ" (pages 16, et seq.), Petitioner suggests that IBM is somehow being abused because of the court process, the use of "submarkets", and a series of lawsuits brought against IBM which are "intolerable." The Ninth Circuit, IBM suggests, should be spared these difficulties since it is "already overburdened" and the decision will lead to "unimaginably high cost to litigants and courts." The Supreme Court rules are ignored by Petitioner's use of such irrelevant arguments which require no response. A fair reading of IBM's writ indicates a frustration with the legal process and a feeling interspersed throughout the brief that somehow the public is being abused when IBM is charged with being a monopolist.

The facts are otherwise and show classical indicia of a monopolist. IBM controls 95% of all of the profits from the computer manufacturing industry. IBM prices its products at 30% over cost, never meets a competitive price and, indeed, the president of the company testified that they had never set a price by the simple device of meeting competition. IBM's profits and growth are truly enormous. The net income of IBM is roughly $100,000,000 per week. Total revenues have grown at a compound rate exceeding 15% for the last 20 years. IBM's share of the lease revenues has traditionally exceeded 80% of the total industry. Witnesses in the Phoenix trial testified that the reason they leased equipment from Greyhound rather than IBM was the fact that it saved the user substantial sums of money—from 10% to 20% of the data processing budget. (Appendix 1a to 4a)

We respectfully suggest that IBM's concern over the public interest and the court system should have been considered by IBM's management before they set about to plan and effectively eliminate a viable system of competition.

In view of the unusual form of IBM's brief and the argument that the courts are "encouraging * * * intolerable" and "costly litigation" against Petitioner, it is ironic to observe that the leasing industry was created in other IBM litigation with the Department of Justice, ending in a 1956 consent decree. (1956 Trade Cases, ¶68,245)

The history of this case begins with that consent decree because, prior to that time, IBM did not sell any of its products but leased them all.

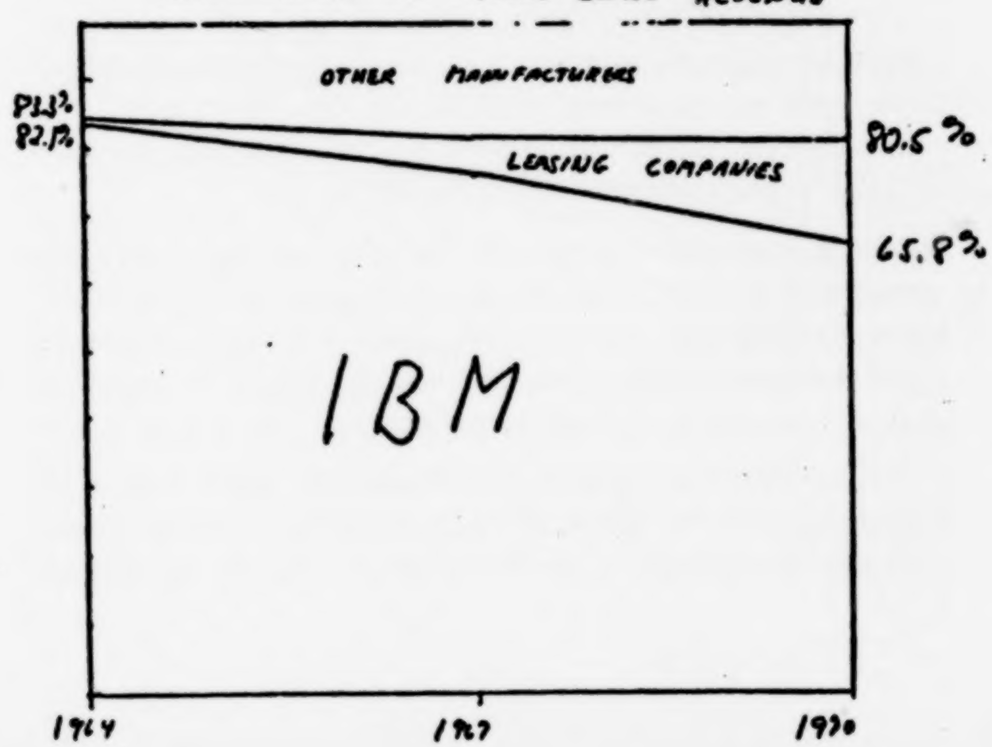
The Department of Justice, in the mid-fifties, brought two cases against alleged monopolists who maintained that monopoly by controlling the industry through renting or leasing equipment. The first of these cases was the *United Shoe* litigation, which was affirmed, *per curiam,* by this Court, (*United States* v. *United Shoe Machinery,* 110 F. Supp. 295; aff'd per curiam 347 U.S. 521, 1954). In that case, United Shoe was found to have violated the Sherman Act by maintaining its monopoly from one generation to the next by leasing its equipment (and not selling it).

The *United Shoe* case is legal authority relating to the IBM litigation, and is also to some extent part of the factual background of the computer leasing industry, because, in the second case brought by the government in the mid-fifties charging a monopoly through "leasing," IBM was the named defendant. IBM settled its case with the government after the *United Shoe* decision; the decree required that IBM make its computers available on a commercially reasonable basis for purchasers. By forcing

both *United Shoe* and IBM to sell hardware and equipment, it was thought that additional competition would be developed after the stranglehold on the industry was eased: "Insofar as * * * machines are sold rather than leased * * * (United) will face a type of substitute competition which will gradually weaken the prohibited market power it now exercises" (*United States* v. *United Shoe,* 110 F.Supp. 295 at 350).

In the early 1960's, as a result of the order on IBM, the computer leasing industry was formed. Greyhound and other companies purchased IBM equipment and then leased it in competition with IBM. The United States government correctly predicted that the growth of such competition would materially affect IBM's control over the industry. IBM's traditional market share (80%) was reduced during the years 1964 through 1970 because the leasing industry obtained approximately 14% of total industry rentals: (Pl. Ex. 188, p. 23)

EFFECT OF LEASING COMPANIES ON IBM'S SHARE OF TOTAL LEASE REVENUE



IBM closely monitored and reacted against the growth of this "leasing industry" which had taken a substantial portion of the rental base from IBM.

It was not the public nor the court system that produced the documents in this case, cataloguing IBM's anxiety over the growth of these fledgling competitors, the planned destruction of those competitors, and the harm and competitive effect produced. Indeed, as the Court of Appeals observed after an extensive five year examination of the record: "In the present case, the jury could have inferred a specific intent to exclude leasing companies from competition" * * * from practices which "appear *prima facie* to be anticompetitive activities that impaired competition without a legitimate business purpose." At another point, the court concludes: "There was ample evidence that IBM officials became concerned that the balance between sellers and renters had turned too heavily toward sales and deliberately set about to reverse the trend." And, further: "There was evidence from which the jury could infer that these anticompetitive practices were intended."

The internal memoranda, studies, and "minutes" of IBM's key operating committees and key executives reflect from 1966 on an obsession with the "purchase mix" and the activities of leasing companies in acquiring a share of IBM's rental base. (Appendix 5a to 9a)

IBM's executives observed that the leasing companies were "eating away" the rental base; and "counteractions" were studied and ordered. The chief executive officer of IBM testified that the company had the power to "turn off and on" the level of product purchase.

As the Court of Appeals observed, IBM eliminated computer purchases by primarily adjusting the purchase prices to make it impossible for the leasing industry to acquire

equipment on an economically reasonable basis. In June of 1970, on the eve of announcing an entirely new system of computers, the pricing mechanism to be applied to these new computers was analyzed in terms of its effect on the leasing industry. This analysis boldly asserts that "The economy will harm the leasing industry by 6% and *IBM's actions will harm the leasing companies an additional 11%.*" (Pl. Ex. 94, App. p. 9a)

Since early 1969, Greyhound has simply been unable to purchase IBM computers and, as the chief executive officer of Greyhound observes in his testimony, Greyhound since that time has simply been "liquidating its inventories." (Tr. 2800)

The Petition for a Writ of Certiorari should be denied because IBM's persistent argument questioning these facts is simply not appropriate to an appeal from a directed verdict in which the more favorable parts of the record should be viewed in the light most favorable to Greyhound. That test, applicable to an appeal from a judgment on a directed verdict, is even more appropriate in a situation in which IBM petitions for a writ of certiorari reviewing only parts of facts construed on this record most favorable to IBM, a test which is simply irrelevant to the petition.

The Petitioner speaks of "legitimate" competition and cites another computer case, *Telex* v. *IBM*, 267 F.Supp. 258, 510 F.2d 894, to prove that facts in this record should not be used or accepted; that argument needs no answer. The monopoly position in leasing and practices directed at that industry cannot be defended by saying that Telex (a peripheral manufacturer) did not establish proof of a monopoly in that market. In any event, the law is settled that the control of 68% of the market, even if a "declining share," is unlawful in a fragmented market.

"With this background of a substantial monopoly, amounting to over two-thirds of the entire domestic field of cigarettes, * * * and with the opposition confined to several small competitors, the jury could have found * * * a combination * * * to monopolize a part of the tobacco industry." *American Tobacco Co.* v. *United States,* 328 U.S. 781, 797-8 (1946).

The Ninth Circuit in a similar case stated the same proposition: (*Case-Swayne Co., Inc.* v. *Sunkist Growers, Inc.,* 369 F.2d 449 (9th Cir. 1966); pp. 452-458):

"Sunkist controlled approximately 70% of all oranges produced in Southern California and Arizona, and approximately 67% of the oranges diverted to product use. * * *"

"It is clear that Sunkist had possession of monopoly power in the relevant market, if that market is found to be the Southern California-Arizona area."

IBM has market power under this definition: 75%-89% of total industry net orders; 77%-84% of total leasing by all manufacturers; 80%-89% of total leasing by direct competitors. (App. 1a to 4a)

IBM's competitors are fragmented. The largest competitor is Honeywell with less than 5% of lease revenue compared to IBM's 80%. (Pl. Ex. 629).

The monopoly power or control (65%-89%) is simply unlawful if in part maintained by ordinary business practices. It is not necessary in a Section 2 monopolization case to show that predatory practices contributed to the market condition.

"Though these practices of United have not been predatory, immoral or on their face discriminatory as between different customers, they have operated as barriers to competition" *United States* v. *United Shoe Machinery,* 110 F.Supp. 295, 297 (1953), aff'd *per curiam* 347 U.S. 521 (1954).

The Supreme Court in *American Tobacco* quoted and incisively endorsed the language of Judge Learned Hand in the *Alcoa* case. *United States* v. *Alumimum Co. of America,* 148 F.2d 416 (2nd Cir. 1945). As noted above, the courts state that a market position of 67% or more is monopoly power. This Court in its analysis compares that power to a group of companies who together "fix prices." If three companies meet and fix prices "They are really partial monopolies." *American Tobacco,* 328 U.S. 783 at 813.

One with monopoly power necessarily controls prices. "As soon as (the monopolist) began to sell at all, it must sell at some price and the only price at which it could sell is a price which it itself fixed * * *." This Court states that it would be "absurd" to condemn independent companies who "fix prices" by agreement, which is a form of partial monopoly, and not apply the same reasoning to an even more thorough "price fixing"—that price structure established by a monopolist. (*ibid*).

The only defense open to such a company is that the "monopoly" was "thrust upon" the monopolist. (*ibid*).

This defense has never been successful. Even Alcoa, which based its defense on invention and technological superiority, failed, because, as the this Court observed in reviewing that case in *American Tobacco,* Alcoa "embraced every opportunity" and the fact that it "never excluded competitors" is immaterial.

The issue before the jury is then whether monopoly was "thrust upon" any company which has market power, meaning 67% or more of the market.

In *United Shoe* the practice of leasing, bundling maintenance, using discriminatory prices and the "seizing" of every opportunity were treated as practices which necessarily maintained a monopoly.

> "But United's control does not rest solely on its original constitution, its ability, its research, or its economies of scale. There are other barriers to competition and these barriers were erected by United's own business policies. Much of United's market power is traceable to the magnetic ties inherent in its system of leasing, and not selling, its more important machines. * * *" (p. 344).
>
> "United's market control is attributable to * * * (third) the company's business practices * * * The methods followed by United in supplying *in one bundle machinery and repair services* in return for one unsegregated set of charges." (p. 297).
>
> "United's own internal documents reveal * * * a policy of *fixing a higher rate* of return where competition is of minor significance and a lower rate of return where competition is of major significance." (p. 340). (110 F.Supp. 295)

The Court of Appeals reviewed a record which included comparable practices, particularly emphasizing the dominant monopoly position shown of record by the use of a massive rental base and pricing which at this stage does not appear to have any basic business purpose and reflects an intention to destroy competition.

The parallel between what IBM has done and the *Eastman Kodak* monopoly case is striking. *Eastman Kodak Company of New York* v. *Southern Photo Materials Company,* 273 U.S. 360 (1927). In both cases, products purchased from the dominant and alleged monopolist were used in competition with the defendant. In both cases, the defendant directed specific acts at the plaintiff and

eliminated competition by virtue of price changes, including the eliminatoin of discounts. In *Eastman Kodak* it was alleged that as part of the maintenance of the monopoly, the defendant "refused to sell the plaintiff its goods at the dealer's discounts." Without such discounts the plaintiff was simply out of business.

The actions of Eastman Kodak and IBM, each seeking to eliminate competition from a distributor or buyer, reflect actions which presumptively established a purpose to monopolize. The Ninth Circuit opinion in Greyhound reviews specific evidence contained in IBM's documents recording that corporation's plan, which was successful, in eliminating the leasing industry competition; but this Court in the *Eastman Kodak* case, without proof of such "specific intent," nonetheless assumed it from the course of conduct in eliminating the competitor. This Court stated:

> "And, although there was no direct evidence—as there could not well be—that the defendant's refusal to sell to the plaintiff was in pursuance of a purpose to monopolize, we think that the circumstances disclosed in the evidence sufficiently tended to indicate such purpose as a matter of just and reasonable inference, to warrant the submission of this question to the jury. 'Clearly,' as was said by the Court of Appeals, 'it would not be held as a matter of law that the defendant was actuated by innocent motives rather than by an intention and desire to perpetuate a monopoly.' This question was submitted under proper instructions." (*Eastman Kodak* v. *Southern Photo,* 273 U.S. 360 at 375).

If IBM is a monopolist, then the only defense is that such a condition was "thrust upon" the defendant. The use of ordinary business practices to maintain the monopoly is unlawful.

Alternatively, as part of the attempt to monopolize case, the jury must decide whether the practices used were part of a plan to monopolize or were instituted for some legitimate business reason.

II. THE QUESTION OF THE RELEVANT MARKET IS PECULIARLY A FACT ISSUE; "LEASING" IS THE TRADITIONAL METHOD OF DISTRIBUTION AND THE ATTEMPT WITHOUT ANY FACTUAL BASIS TO SUPPORT THE PETITION BY USING AN ALTERNATE MARKET, CALLED THE EDP INDUSTRY, IS SPECIOUS.

IBM's petition selects certain "cross examination evidence" and other inferences from the record and pastes these statements together as if the obligation of the Petitioner were simply to resist a motion for summary judgment or sustain a jury verdict on appeal. The notion that there is some loose-knit market called EDP is simply specious. Not one witness at the trial agreed to that and, indeed, there is uncontroverted, substantial evidence that the primary method of doing business in the industry is through the process of leasing computers.

The President of IBM and the President of Greyhound agree on one subject: their respective companies operate and compete in the business of leasing computers:

IBM's Cary.

> "We have been over the years predominantly a leasing business, at one point in time exclusively a leasing business." To change to a purchase business "could have so many effects (on IBM) I wouldn't begin to know how to describe them all to you." (Tr. 3465-66)

Greyhound's Bumpers

> "(We compete) against IBM, against other manufacturers of general purpose computer equipment and against other leasing, risk leasing companies. . . . It is basically a rental business and people want . . . to be committed to keep the equipment as short a time as possible." (Tr. 2715)

IBM now argues that its enormous annual computer lease revenue—*\$2.5 to \$4.0 Billion*—represents 38% (not 80%) of the market because the market includes the fees *received by IBM's customers in using the acquired equipment.*

This market—a hodgepodge of unrelated businesses called the EDP industry—includes the hundreds of banks and computer users who through time sharing or service bureaus obtain revenue from the equipment leased from IBM. (Pl. Ex. 577, Gyh. App. pp. 98-102)

Not one witness testified that such an industry constitutes a market or alternative choice to users. The "EDP industry" was created when IBM's attorneys obtained the right in multidistrict discovery to serve written interrogatories on thousands of data processing users—banks, software-sellers, time sharing enterprises. Each of these businesses first obtains a computer, usually by leasing it, and then uses that computer to satisfy its own accounting needs, and at times derives fees by selling time on the computer. The analogy to the transportation industry is helpful. General Motors manufactures and distributes vehicles—buses, passenger cars, and trucks. They have a determinable share of that industry. If, however, the bus owner or the truck owner is asked under writtein interrogatories to state the income or fees derived by using the truck or the bus, then a much larger universe results from the total receipts by bus companies and truck companies *using* the vehicles. IBM has seriously advanced that precise market definition to control this case without a shred of evidence to support it based entirely on the

fact that the statistics were collected in the multidistrict discovery and therefore are "usable". In short, IBM's market share of computer manufacturing and distribution (leasing) is treated as a part of an industry which includes "all fees from the use of data processing equipment".

Stated another way, every time IBM leases a computer for $100,000 a year IBM's share of market drops because the total market is immediately increased by the fees which the computer will produce for the user. Greyhound respectfully submits that such an analysis is palpably erroneous; and such specious reasoning accounts for the incredible suggestion that there have been 1,200 new companies that have come into the market. Every time IBM leases a computer to a customer who in turn derives fees from it that is treated as an "entry". Carrying this argument to its logical conclusion, IBM has the privilege of driving Honeywell, Control Data and the remaining handful of computer manufacturers out of business—following the experience of General Electric and RCA—and thereby control 100% of computer manufacturing and distribution. Viewed through the analysis of the IBM attorneys that result is a lawful extension of IBM's position and does not constitute any form of monopoly because the users of this equipment will, through time sharing and service bureaus and software programs, derive fees from the use of the equipment and each such use constitutes a new entry which absolves IBM from any monopoly position. We respectfully suggest that that reasoning emasculates the Sherman Act.

Apart from the unusual market theory necessary to IBM's "EDP" concept, witnesses from these unrelated businesses testified that they do not compete with the leasing industry.

By far, the largest volume of "entry" in the "EDP" industry is represented by the hundreds, in fact, thousands of little businesses that attempt to sell to data processing users various packages or software to facilitate the use of the equipment. These businesses, like gasoline service stations, provide some aid in using the equipment, but they, again, have no connection whatever with the hard core industry of manufacturing, distributing or leasing computers. (Tr. 1469-71, 1649-50). McGovern stated:

> "The companies that provide software programming services do not compete in any practical way with companies who are leasing hardware." (Tr. 3227)

Time sharing is another use of computer hardware. Uniformly witnesses testified that such time sharing service does not compete with the leasing of the hardware. (Tr. 388, 882, 929, 1408, 1435-36, 1513).

A substantial number of companies provide software and tabulating services for a fee. (Tr. 389). These companies lease hardware from IBM or Greyhound, and provide some form of data processing service. Their annual sales or fees for data processing services have nothing whatever to do with the leasing of hardware or the manufacturing of hardware.

Users who lease computers uniformly testified that a service bureau was simply not a viable alternative to leasing a computer.

> Q. I gather that a service bureau is not an alternative for the ownership or leasing of (computer) equipment. Is that right?
>
> A. That is a true statement. (Tr. 953)

Another such witness, John Smith, had been over the years both the president of a leasing company and an

officer of a large service bureau enterprise. (Tr. 1740-41). The testimony on competition from this businessman is explicit.

> Q. As an officer of both the leasing company and the service bureau company, can you tell us based on your experience whether the two businesses compete?
>
> A. Absolutely not. They complement each other. (Tr. 1742)

The so-called "EDP" market thus includes the fees from IBM's customers who are engaged in noncompetitive businesses.

The census total or "EDP industry" includes all revenues from programming services, management consulting firms and data processing education. (Tr. 3220, 3225).

It is, in short, a collection of miscellaneous businesses which, like travel bureaus, gasoline service stations and parts suppliers, have some relationship to the "transportation" industry—but hardly help define the market share of General Motors in passenger car distribution.

The repeated recitation by IBM of something called the "EDP" industry does not establish it or even suggest that a jury would believe it. IBM has simply ignored the fundamental discipline of an appeal from a directed verdict and the thrust of the petition is that manufacturing, leasing and service bureaus—a hodgepodge of unrelated businesses—are to be called the EDP industry and since IBM—and not one single witness—says that, it necessarily must be so. The witnesses who testified in the case have no difficulty distinguishing among a service bureau, a purchase transaction or a lease. As this Court stated in *United States* v. *Grinnell Corp.,* 384 U.S. 563 (1966), it is important to determine the customer prefer-

ences to indicate the outer boundaries of a market. In that case, this Court rejected the defendant's contention that all forms of "protection" constituted a market and stated, rather, that alarm systems were the only kind of protection that would do for many customers. In short, they did not have a realistic alternative. IBM has not put on a single witness who has stated that this EDP industry is a market for anything.

The industry is basically composed of those manufacturers who produce general purpose commercial computers. The industry thus does not consist of 11,000 businesses at all. It is, rather, a handful of companies.

REPORTED LEASE REVENUE

Court Census figures (000's)

	Year	%	*Year*	%	*Year*	%
Manuf.	1964		1967		1970	
Burroughs	$17,367	1	$ 49,479	2	$123,033	4
Control Data	24,279	2	61,286	3	58,533	2
Honeywell	29,240	3	85,408	4	144,822	4
General Electric	27,380	2	53,817	3	68,903	2
NCR	15,742	1	32,721	1	61,711	2
RCA	29,162	3	55,516	3	86,453(90,615)	3
Univac	48,863	4	73,426	4	88,956	3
	(59,336)		(87,374)		(105,857)	
IBM	991,035	84%	1,702,549	80 %	2,471,369	80%
Totals	1,175,101		2,114,221		3,103,747	
	(1,184,374)		(2,128,386)		(3,124,810)	

(Px. 618, 629)

During the time covered in this trial, two of IBM's largest competitors, RCA and General Electric, left the industry and wrote off their computer business; these

losses exceeded $500,000,000 (Appendix at 1a). The number of viable manufacturers of general purpose computers on this record has materially declined.

We respectfully suggest that using the legal basis for treating "leasing" as a market is derived from the simple proposition that you determine the market based upon the principles of "reasonable interchangeability" and realistic alternatives that buyers have. (*United States* v. *E. I. DuPont De Nemours & Co.,* 351 U.S. 377 (1956).

IBM's own documents establish that the predominant method of doing business is "leasing." The testimony of independent witnesses confirms that fact. Wholly apart from that, however, this Court has already determined that such items as "rolled steel" constitutes a business market. (*United States* v. *Columbia Steel Co.,* 334 U.S. 495) Women's dresses of "original design" represent a separate market for purposes of the Sherman Act (*Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U.S. 457); "first run" motion pictures (*United States* v. *Paramount Pictures,* 334 U.S. 131); the news services of one news agency (*United States* v. *Associated Press,* 52 F.Supp. 362 (S.D.N.Y.), aff'd 326 U.S. 1); and newspaper advertising as distinguished from other means of news dissemination (*Times-Picayune Co.* v. *United States,* 345 U.S. 594).

In short, the facts and the law amply support the Court of Appeals decision that it is a jury question as to whether leasing constitutes a relevant market.

III. THE SUPREME COURT SHOULD NOT EXERCISE ITS DISCRETION TO REVIEW AN OPINION ON THE THEORY THAT AN ALTERNATIVE ANALYSIS WAS USED TO SUPPORT THE ATTEMPT TO MONOPOLIZE DECISION.

Unquestionably, the Ninth Circuit found that IBM monopolized the leasing of general purpose computers; and further found substantial evidence that IBM, alternatively, intentionally—without a legitimate business purpose—removed Greyhound and others from that market. In that analysis, a "dangerous tendency" to monopolize is assumed.

IBM suggests that in a full trial there will be some other evidence with respect to market share and that the jury might well believe that service bureaus, the sales of computers and other "methods of distribution" are all part of one market, which IBM calls the "EDP" market. It is unlikely that a jury will accept that argument because it is analogous to stating that General Motors does not monopolize the bus manufacturing and distribution business because it is necessary to include all the receipts from the use of the bus by the bus purchaser in order to determine the total "distribution" market. There is substantial evidence that a service bureau is not an alternative to the leasing of a computer but nonetheless IBM suggests that there will be some evidence, if this case is ever tried to a jury verdict, on the issue of the market and that instead of an 80% market share, IBM may have a 40% or a 37% share of such a larger total market.

In that context, Greyhound from the beginning has suggested that at the very least IBM has attempted to monopolize the leasing of general purpose computers; even

IBM admits that it has a 37% market share of all EDP. The District Court granted a directed verdict not only on the question of monopolization but also on the issue of attempt to monopolize.

The Chief Judge of the Ninth Circuit, in reviewing this question, analyzed the problem alternatively, first stating: "We have held the evidence sufficient to permit the jury to find that IBM monopolized the submarket for the leasing of general purpose commercial computers." The court then alternatively assumes "for the purpose of evaluating the attempt to monopolize issue" that the record does not support a finding of monopoly or of a "dangerous probability of monopolization."

In that context, the court discusses the issue of an attempt to monopolize without evidence of monopoly, without evidence of the dangerous probability of monopolization and without evidence of a relevant market. In discussing that alternative, the court refers to approximately nine cases in the Ninth Circuit in which an attempt to monopolize case "is made out by evidence of a specific intent to monopolize any part of commerce plus anticompetitive conduct directed to the accomplishment of that unlawful purpose." Indeed, the court goes out of its way to suggest that there is substantial evidence of a "specific intent to exclude leasing companies from competition" which, as the court analyzes this evidence, constitutes *"prima facie"* anticompetitive activity that impairs competition without a legitimate business purpose.

We, of course, recognize that other circuits used different legal tests. The original Ninth Circuit opinion in *Lessig* v. *Tidewater Oil Co.* was decided in 1964 and certiorari was denied. *Lessig* v. *Tidewater Oil Company,*

327 F.2d 459 (9th Cir. 1964) *cert. den.* 377 U.S. 993 (1964).

This Court has refused to accept a petition for a writ of certiorari on the narrow issue of the Ninth Circuit statement that certain kinds of specific acts which do not have a legitimate purpose constitute such anticompetitive conduct that a *prima facie* case of attempt to monopolize is made. *Lessig* v. *Tidewater Oil Company,* 327 F.2d 459 (9th Cir. 1964), *cert. den.,* 377 U.S. 993 (1964); *Hallmark Industry* v. *Reynolds Metals Co.,* 489 F.2d 8 (9th Cir. 1973), *cert. den.,* 417 U.S. 932 (1974) *reh. den.,* 419 U.S. 1028 (1974); *Chisholm Brothers Farm Equipment Co.* v. *International Harvester Company,* 498 F.2d 1137 (9th Cir. 1974), *cert. den.,* 419 U.S. 1023 (1974); *Knutson* v. *The Daily Review, Inc.,* 548 F.2d 795 (9th Cir. 1976), *cert. den.,* U.S.L.W. 3840 (6/27/77).

We respectfully suggest, in view of the fact that this Court has not taken any of those cases in which the question was pointedly raised, that this is not the time to consider that question in the context of this litigation because:

First. It is really an alternative issue raised by the court after first finding actual proof of monopoly and the issue was discussed as an alternative or secondary basis for decision.

Second. This case has still to be tried to the jury. It is in the nature of an interlocutory appeal. We do not have the charge to the jury and, indeed, we cannot assume at this time what that charge will be.

IV. CONCLUSION

Greyhound pleaded an antitrust case in early 1970; the case spent two and one-half years in multi-district discovery. The case was tried in May, June and early July of 1972. The directed verdict was reversed by a thorough opinion after an intensive five year review in August of 1977.

We respectfully pray that the petition be denied and the case remanded for a full jury trial.

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APPENDIX

Portions of The Briefing Record Reviewed By The Court of Appeals

I. Monopoly Power: IBM Monopolizes Profits, Orders And The Installed Base; Entry Is Foreclosed And Products Are Priced Without Regard To Competition.

By any fair measure or analysis, IBM completely dominates and dwarfs its competitors. IBM extracts 96% of total industry profits reported by the computer systems manufacturers.

	1966	1967	1968	1969	1970	1971
	(millions of dollars)					
Total Profits	539	855	1466	1557	1446	1476
IBM Profits	627	843	1343	1389	1412	1403
IBM's Profit %	116%	99%	92%	89%	98%	95%

Source: Pl. Ex. 635.

General Electric, RCA and NCR have consistently reported an annual net loss on computer operations; General Electric lost $160,000,000 in 1966-67 and eventually left the industry; RCA followed with a 1971 write off of $500,000,000; Control Data reported a $61,000,000 net loss in 1970; and NCR reported losses in each year with its largest ($20,000,000-$30,000,000) in 1971. (Pl. Ex. 635; Tr. 1658).

IBM's raw market power can be illustrated by a detailed comparison with its principal competitors as of 1969:

	Total Computer Revenues (millions of dollars)	Lease Revenues	Installed Computers
Burroughs	179.5	100.3	1,389
Honeywell	235.4	135.0	2,987
Univac	297.8[1]	106.1	2,306[2]
IBM	3,731.0	2,113.4	29,388
IBM	84%	86%	82%

Sources: Revenue figures from Court Census; Installed Computers from Def. Ex. I-4

[1] Excludes military revenues.
[2] Excludes Univac's 1004 which is below IBM's lowest priced machine.

From 1966 to 1969 the industry can be analyzed with some precision because IBM tracks every order by major sub-product line or "market place." In the general computer line IBM recognizes each of the following as a separate "market place."

	360/20	360/30	360/40	360/50	360/65	Total
Burroughs	94	492	315	102	0	1,003
Honeywell	866	762	167	27	11	967
Univac	1,473	454	30	5	95	2,057
IBM	11,606	6,575	2,590	1,246	723	22,740
IBM	82.7%	79.4%	83.5%	90.3%	87.2%	85.0%

Source: Pl. Ex. 17 (IBM December 1969 Marketplace Report)

As part of the multidistrict pre-trial discovery in the computer litigation, a court ordered "census" was prepared. The results corroborate IBM's tabulations and the industry estimates. (Tr. 2955-2966).

REPORTED LEASE REVENUE

Court Census figures (000's)

Manuf.	*Year* 1964	*%*	*Year* 1967	*%*	*Year* 1970	*%*
Burroughs	$17,367	1	$ 49,479	2	$123,033	4
Control Data	24,279	2	61,286	3	58,533	2
Honeywell	29,240	3	85,408	4	144,822	4
General Electric	27,380	2	53,817	3	68,903	2
NCR	15,742	1	32,721	1	61,711	2
RCA	29,162	3	55,516	3	86,453(90,615)	3
Univac	48,863 (59,336)	4	73,426 (87,374)	4	88,956 (105,857)	3
IBM	991,035	84%	1,702,549	80 %	2,471,369	80%
Totals	1,175,101 (1,184,374)		2,114,221 (2,128,386)		3,103,747 (3,124,810)	

(Px. 618, 629)

The total size of the industry and IBM's share does not appreciably change if the lease revenues of all peripheral manufacturers and the "mini" or process control computers are included: (Tr. 2949-2966) (Pl. Ex. 625).

	1964	1967	1970
IBM as a % of the Total	83%	80%	77%

With the continued maintenance of such market power entry has been closed (Tr. 1671-72, 3189).

Six companies have left systems manufacturing in addition to RCA and General Electric (Tr. 3187).

Xerox studied "entry" and concluded that the investment required—several hundred millions—and IBM's stranglehold on the rental base simply precluded entry.

> "Viability in the main frame business requires investments in the order of several hundreds of millions of dollars. . . . You don't enter the main frame business in 1966-67, in my view." (Tr. 1528).

IBM controls entry—as is fully considered, *infra*—by its pervasive grip on the rental base. "The key factor that contributes to their dominant position is the massive rental base that they built for themselves." This "permits IBM to move users from one generation to the other of computers . . . It creates a captive audience * * *." (Tr. 1655).

Finally, IBM is a monopolist because it prices products well above "the best" of competitors and raises prices with impunity and without changes in volume.

In the fall of 1966, IBM raised rental prices 3% while reducing purchase prices 3%. This increase would "not affect the volume of equipment rented" for the simple reason that the President admitted in his trial deposition that the demand curve was "inelastic."

> "Q. Did you determine at least in part, sir, that the rental demand was inelastic in a sense that this increase would not affect the volume of equipment that you had on rental?
>
> A. Yes. I think we concluded that." (Tr. 3448).

IBM's prices were always higher than competition. Mr. Cary indicated that they were "5% to 15% above the best of competition." (Tr. 3376). Mr. Cary cannot recall any instance when his prices were reduced to be equal to competition. (Tr. 3376-3377).

As Mr. Watson stated, the corporation has never been reduced to the simple competitive experience of "meeting a competitor's price."

> "Q. Well, I appreciate that, but have you ever actually attempted to set a price—instead of the calculation method that you just generally outlined, have you ever—that is, IBM—ever set a price by simply meeting a competitor's price?
>
> A. Never." (Tr. 3967).

IBM determines price by use of a complicated formula—which absorbs all costs—over the program life and "adds the 30% corporate profit objective." Watson (Tr. 3704): A percentage of profit is "built into the price" after all of the costs are collected. These costs and "the profit pricing objective" are included in the rental price. (Tr. 3706, Pl. Ex. 641).

IBM is a monopolist because it has: monopolized industry profits (96%); controls industry net orders (75%-90%); dominates the industry rental base (80%); prospers while major competition loses enormous sums leading to industry concentration and impossible barriers to entry; and, finally, practices the classical pricing disciplines of a monopolist.

II. The Record Is Replete With Evidence Establishing The State Of Mind Of IBM: Purchases By Leasing Companies Must Necessarily Be Contained, Controlled And Hopefully Eliminated; Otherwise, The Long-Range Profits And Control Over Technology Through The Rental Base Would Be Eliminated.

The internal memoranda, studies and "minutes" of the key operating committees reflect from 1966 on an obsession with the "purchase mix" and the activities of leasing companies in acquiring a share of IBM's rental base.

> *November 22, 1965*: "Managing" purchase revenues to obtain "stable growth" was an objective according to the Management Review Committee. (Pl. Ex. 646)
>
> *January 3, 1966*: The principal objective of IBM is to maintain its market share on all products "across the board"—Thomas J. Watson, Jr. (Pl. Ex. 654).
>
> *August 17, 1966*: In examining the "purchase/rental mix" * * * "it was agreed that our objectives should be to *minimize purchase*." (Pl. Ex. 662).
>
> *September 6, 1967*: The Management Review Committee noted that: "The leasing companies in total were now bigger than any single competitor." (Pl. Ex. 664).

September 11, 1967: The Director of Finance (Papes) noted that the company was "on the brink of a further escalation of purchase beyond any levels previously seen." Various alternatives were suggested. The one that "all of us would choose" was stated to be: "Contain 1967 equipment sale at a reasonable level." The Director of Finance urged "every possible" effort to contain equipment sales. (Pl. Ex. 124).

September 21, 1967: Papes: "It is probable the vast majority of points purchased by leasing companies will remain on rent for a period sufficient to represent a *significant loss of profits* by IBM from a total program point of view." (Pl. Ex. 97).

November 29, 1967: The Data Processing Group's two year plan was presented to the Management Review Committee in late 1967. Bullen, Vice-President, summarized the Management Committee position: "Purchase Revenue: He pointed out again that little could be done to affect 1968 and that many proposals were in the works to make changes which could alter 1969." (Pl. Ex. 650).

December 14, 1967: The Management Review Committee: "there was then a discussion of the direction of purchase trends and what fundamental changes in our business this might bring about." (Pl. Ex. 650).

January 17, 1968: On this date the Director of Finance outlined problems to the Executive Vice-President, Mr. Cary: "the most serious business problem we face is the sharp acceleration of equipment sale." The Director openly stated that "in my opinion" the company must "take several positive actions to correct the severe imbalance of purchase and lease." (Pl. Ex. 111)

January 25, 1968: In early 1968, Mr. Beitzel, later President of the Data Processing Group, stated the basic objective to be a "purchase revenue of 10% to 15% of total inventory." (Pl. Ex. 666).

April 30, 1968: "The level of purchase we have experienced for the last 12 months is in my opinion totally out of line with the appropriate balance of lease and purchase and is in fact excessive when viewed in context with the long-term growth objectives of the corporation." (Krowe, Director of Information System, Pl. Ex. 112).

July 31, 1968: By this date the 1968-74 strategic plan was completed. Management Review Committee minutes reflect that the shift in the installed inventory from lease to purchase was discussed. "The major issues were (1) purchase levels, (2) expense levels and (3) manageability of change." Various plans were reviewed for the "purchase activity" in each plan. Leasing companies were analyzed in depth: "There was a discussion of leasing company dynamics and the factors which bore on activity in this area." (Pl. Ex. 651).

September 18, 1968: Mr. Watson writes his memo that because IBM's rental base is being eaten away, "the options of counteractions are what I think we should be thinking of and deciding upon." (Pl. Ex. 144). The intent shows even more clearly from this colloquy:

> "Q. At the time you wrote it, what did you mean by "counteractions" in that last sentence?
>
> A. We were changing from a total rental machine business to a rental and sales machine business, and as we moved across so that more and more of our inventory was owned by leasing companies, the ability to grow in a normal way was becoming less and less—we had less and less of that ability." (Tr. 3761-62).

December 11, 1968: Senior Vice-President Jones noted the concern over purchase: "I need not stress the dramatic effects on future profits that the outright purchase bulge in 1968 has on our operating plans." (Pl. Ex. 118).

May 1, 1969: On this date the Chief Financial Officer in a detailed memorandum on the data processing business projections for the years 1969-1975 pointedly observed that the "large purchase bubble affected the company and added statistics to prove the "long-term profit degrading effects of purchase." (Pl. Ex. 267).

The Chief Executive Officer openly admitted that the objective was to *"turn on or off"* the level of purchases:

> "Q. Did the corporation at any time have an objective in terms of the percentage of purchase revenue it would have?
>
> A. Well, in previous questioning I have suggested that in *turning off and on* the purchase of installed, we did have an interest in the level of purchase." (Tr. 3739-3740). (emphasis supplied).

Here—in IBM—the classic profile of a monopolist hovers over a basic industry. The rise of the leasing industry was unanticipated. It grew and was watched and measured. By 1967 IBM's long run profits were threatened. "Nothing could be done" about 1968 but there was "plenty in the works" for 1969—admonished IBM executives. The Chief Executive Officer, Mr. Thomas J. Watson, Jr., openly stated that the basic goal of the corporation was to constantly monitor and maintain the corporation's "market share across the board."

From 1964 to 1971, IBM systematically changed each of the controlling practices on which leasing company viability is based; technological discounts were removed; multipliers were raised; maintenance was trebled; services promised were discontinued; a discriminatory sales plan was instituted. By the announcement of the NS or 370 computers—purchase—critical to IBM's future—was "contained" or, to use the words of Mr. Watson: "The purchase of installed was turned off."

In 1970, on the eve of the NS announcement, the corporation recorded its triumph in a profitability and viability study supporting the NS program; in unmistakably clear language, the "practices" of IBM comparing the years 1971 to 1966, were underscored:

> "IBM practices will harm the leasing industry an additional 11%." (Pl. Ex. 94).

The computer leasing industry has thus been reduced by design to a trickle of activity; no eating away of the rental base now occurs and IBM is free to charge customers the 15% above the "best" of competition that President Cary seeks—through a 30% profit tacked on its rental base.

What monopolist in anti-trust case law evidenced such overt control of price and entry and was shown to have:

——— never met a competitive price;

——— raised prices as needed because the demand was "inelastic"; meaning that *volume* was unaffected by higher prices;

——— announced to its massive rental base a substantial price increase with impunity: no customers were lost in the process;

——— increased prices on products that have little competition after severe price cuts to maintain a 70% monopoly on peripheral gear;

——— tied up or locked out leasing companies by two-year commitments engineered through severe discounts in the form of a "fixed term plan";

——— destroyed its "distributor" competitors (non-manufacturing leasing companies) by select and premeditated practices.